

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DION D. ARMSTEAD,

Defendant-Appellant.

UNPUBLISHED

March 13, 1998

No. 195945

Recorder's Court

LC No. 95-009719

Before: Markman, P.J., and McDonald and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for first-degree felony murder, MCL 750.316; MSA 28.548, second-degree murder, MCL 750.317; MSA 28.549, armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to life imprisonment for the felony murder conviction, 240 months to life for the second-degree murder conviction, 120 to 240 months' imprisonment for the armed robbery conviction, and two years' imprisonment for the felony-firearm conviction. The sentences for felony murder, second-degree murder, and armed robbery are to run concurrent with each other, and consecutive to the sentence for felony-firearm.

Defendant first argues that his convictions for second-degree murder and armed robbery must be vacated because they violate the Double Jeopardy clause of the Michigan and United States Constitutions. We agree.

Defendant did not raise this issue before the trial court. Nonetheless, because a significant constitutional question is presented, this Court may review the error. *People v Passeno*, 195 Mich App 91, 95; 489 NW2d 152 (1992). This Court reviews constitutional questions of law de novo. *People v Houstina*, 216 Mich App 70, 73; 549 NW2d 11 (1996).

The federal and state constitutions both prohibit placing a person in jeopardy of criminal conviction or incarceration twice for the same offense. US Const, Am V; Const 1963, art 1, § 15. Convictions for both felony murder and second-degree murder for the killing of same individual violate double jeopardy. *Passeno*, *supra* at 96. The remedy for such a violation is vacation of the second-

degree murder conviction. *Id.* A defendant's right against double jeopardy is also violated if he or she is convicted of both felony murder and the underlying, or predicate, felony. *Id.* at 96-97; *People v Gimotty*, 216 Mich App 254, 259-260; 549 NW2d 39 (1996). The remedy for this violation is vacation of the conviction and sentence for the underlying felony. *Passeno, supra* at 97; *Gimotty, supra* at 259-260.

In the present case, defendant was convicted of first-degree felony murder, second-degree murder, and armed robbery. These charges arose out of the killing of a single individual during the commission of an armed robbery, which was the predicate felony. Therefore, defendant's convictions of first-degree felony murder, second-degree murder, and armed robbery violate the constitutional prohibitions against double jeopardy. *Passeno, supra*, 195 Mich App 95-96. Accordingly, we vacate defendant's convictions and sentences for second-degree murder and armed robbery.

Defendant next argues the prosecution failed to establish an independent basis for the tainted in-court identifications of defendant by one of the prosecution's witnesses. Defendant failed to preserve this issue for appeal because he did not raise it at trial. Because we determine that no manifest injustice resulted from the pretrial identification procedures, we decline to review this issue. *People v Whitfield*, 214 Mich App 348, 351; 543 NW2d 347 (1995); *People v Mischley*, 164 Mich App 478, 481-482; 417 NW2d 537 (1987).

Defendant next argues that insufficient evidence was presented to sustain his conviction for armed robbery. We disagree.

When reviewing a claim of insufficient evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Circumstantial evidence, and reasonable inferences arising from the evidence, may constitute satisfactory proof of the elements of the offense. *People v Hutner*, 209 Mich App 280; 530 NW2d 174 (1995). The essential elements of an armed robbery are (1) an assault, and (2) a felonious taking of property from the victim's person or presence, while (3) the defendant is armed with a weapon described in the statute. *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993). An assault is an attempted battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery. *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995).

In the present case, sufficient evidence was presented to establish the elements of armed robbery. At trial, evidence showed that defendant and one or two other unidentified men approached the vehicle in which Farris, Eckles, Williams and Nealy were sitting, pointed guns at the occupants of the vehicle and at Reed, and demanded their purses. The act of pointing guns at the occupants establishes an assault, since it would have placed the occupants in reasonable apprehension of receiving an immediate battery. Moreover, Eckles testified to being frightened at having a gun pointed at him. While this assault was occurring, a man with defendant grabbed a purse from Nealy. When the car drove away, defendant fired a shot into it, striking and killing Farris. Subsequently, defendant and another man walked Reed down the street at gunpoint, then took a necklace and saddlebags from him.

The robbery of Reed was part of a continuing felony transaction during which Farris was shot. Defendant's argument that there was insufficient evidence of intent to rob is without merit. The intent to rob can be inferred from the evidence presented. The evidence established that defendant was armed with a weapon, feloniously took property from Reed's person, and participated in the robbery of the purse from Nealy. Accordingly, there was sufficient evidence presented for a reasonable jury to conclude beyond a reasonable doubt that an armed robbery occurred and reversal of defendant's convictions and sentences on this basis is not warranted.

Finally, defendant argues that he was denied effective assistance of counsel. Because defendant did not move for a new trial or an evidentiary hearing on this basis below, appellate review of his claim is foreclosed unless the record contains sufficient detail to support his claims, and if so, review is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). After reviewing the record, we find that defendant failed to overcome the presumption that he was provided effective assistance of counsel. *People v Eloby*, 215 Mich App 472, 476; 547 NW2d 48 (1996). Defendant has failed to show that the actions of his trial attorney were not sound trial strategy and has failed to establish the requisite prejudice, that absent the alleged errors, there was a reasonable probability that the jurors would have had a reasonable doubt about his guilt. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *People v Pickens*, 446 Mich 298, 312; 521 NW2d 797 (1994).

Affirmed in part and remanded for entry of a corrected judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Stephen J. Markman

/s/ Gary R. McDonald

/s/ Mark J. Cavanagh